



October 1, 2004

VIA ELECTRONIC FILING

EX PARTE

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *CC Docket No. 01-338 and WC Docket No. 04-313*

Dear Ms. Dortch:

CompTel/ASCENT is writing to inform the Commission that on September 21, 2004, SBC Ohio filed the attached Complaint against 113 CLECs asking the Public Utility Commission of Ohio to approve a proposed amendment to its Ohio interconnection agreements "as sufficient to conform interconnection agreements to governing law" and to order that "the Respondent CLECs incorporate this approved amendment into their interconnection agreements by November 15, 2004."¹ SBC alleges that it filed the Complaint at the "direct suggestion of the Federal Communications Commission."²

Contrary to SBC's assertions, SBC's filing of the Complaint does not comply with the procedures this Commission authorized the ILECs to follow in the event they decided to invoke the change of law provisions of their interconnection agreements prior to the adoption of final rules. Specifically, the Commission preserved the ILECs' contractual rights to initiate change of law proceedings so long as those proceedings were consistent with the requirements of their interconnection agreements as well as the Commission's twelve-month transition plan:

¹ Complaint at 15.

² Complaint at 3.

in order to allow a speedy transition in the event we ultimately decline to unbundle switching, enterprise market loops, or dedicated transport, we *expressly preserve incumbent LECs' contractual prerogatives to initiate change of law proceedings to the extent consistent with their governing interconnection agreements*. To that end, we do not restrict such change-of-law proceedings from presuming an ultimate Commission holding relieving incumbent LECs of Section 251 unbundling obligations with respect to some or all of these elements, but under any such presumption, *the results of such proceedings must reflect the transitional structure set forth below.*³

The transition plan proposed by the Commission contemplates that in the absence of a ruling that switching, dedicated transport and/or enterprise loops have to be unbundled pursuant to Section 251(c)(3), the ILECs will continue to make such elements available to the CLECs' existing customer bases for six months following the expiration of the interim rules, albeit at rates that reflect "moderate price increases."⁴

Neither SBC's Complaint nor the relief it seeks complies with the Commission's directives. SBC implicitly concedes that its initiation of litigation against most, if not all, of the CLECs in Ohio to force the adoption of its proposed amendment text is not consistent with the change of law provisions of its interconnection agreements. Nonetheless, SBC attempts to justify its evasion of its contractual obligations by bemoaning the Commission resources that would be expended "in the resolution of multiple dispute resolution proceedings involving different agreements."⁵ Moreover, while SBC's proposed amendment incorporates the presumption that the Commission's final rules will not require that switching, dedicated transport and enterprise loops be unbundled pursuant to Section 251(c)(3), it does not incorporate the six month transition period following expiration of the interim rules that the Commission has stated will be included in the final rules. Instead, SBC offers to give CLECs 30 days notice that unbundled elements will no longer be provided. During that 30 day period, CLECs must either issue orders to disconnect the elements or agree to pay resale or special access rates for the elements.⁶

³ *In the Matter of Unbundled Access to Network Elements*, WC Docket No. 04-313 and CC Docket No. 01-338, Order and Notice of Proposed Rulemaking, FCC 04-179 (released August 20, 2004) at ¶22 (emphasis added).

⁴ *Id.* at ¶¶ 29-30.

⁵ *Id.* at ¶ 8.

⁶ Exhibit A to SBC Ohio's Complaint at Section 3.1.

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Although the Ohio Commission will have to deal with the merits of SBC's Complaint, CompTel/ASCENT submits that in formulating final unbundling rules, this Commission should be aware of SBC's apparent disregard for its determination that the twelve-month transition period "is essential to the health of the telecommunications market and the protection of consumers."⁷

Respectfully submitted,

Mary C. Albert
CompTel/ASCENT
1900 M Street N.W., Suite 800
Washington, D.C. 20036

cc: Jeffrey Carlisle
Russell Hanser

⁷ *In the Matter of Unbundled Access to Network Elements*, WC Docket No. 04-313 and CC Docket No. 01-338, Order and Notice of Proposed Rulemaking, FCC 04-179 (released August 20, 2004) at ¶17.

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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of SBC Ohio,

Complainant,

v.

Case No. 04-1450-TP-CSS

ACC Telecommunications LLC
Access One, Inc
ACN Communications Services, Inc
Adelphia Business Solutions Operations, Inc.
Akron Canton Communications, Inc.
Allegiance Telecom of Ohio, Inc.
American Broadband & Telecommunications Company
American Fiber Network, Inc.
American Fiber Systems, Inc.
Ameritalk Corp.
AT&T Communications of Ohio, Inc.
BAK Communications, LLC
Bright CLEC, LLC
Broadview Networks, Inc.
Brooks Fiber Communications
Budget Phone, Inc.
BullsEye Telecom, Inc
Call Solutions Inc.
Callnet Communications, Inc
Cat Communications International, Inc.
Choice One Communications of Ohio, Inc.
Cincinnati Bell Telephone Company
Cinergy Communications Company
Cinergy Telecommunications Networks-Ohio, Inc.
City Signal Communications, Inc.
Citynet Ohio, LLC
CloseCall America, Inc.
Comcast Phone of Ohio, LLC
Comm South Companies, Inc.
ComTech21, LLC
CoreComm Newco, Inc.
Covista, Inc.
digicom, Inc.
Digital Connections, Inc.
Direct Telephone Company, Inc.
dPi Teleconnect, L.L.C.

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DSLnet Communications, LLC)
Easton Telecom Services, LLC)
Ernest Communications, Inc.)
Excel Telecommunications, Inc.)
Faster Processing, LLC)
First Call Communications, Inc.)
First Communications, LLC)
FIRST USA, INC.)
Focal Communications Corporation of Ohio)
Global Crossing Local Services, Inc.)
Global NAPs Ohio, Inc.)
Globalcom, Inc.)
Granite Telecommunications, LLC)
ICG Telecom Group, Inc)
Impact Network Solutions, Inc.)
Integrated Communications Solutions, LLC)
Intermedia Communications, Inc.)
KMC Data, LLC)
KMC Telecom III, Inc.)
KMC Telecom III, LLC)
KMC Telecom V, Inc.)
KMC Telecom, Inc.)
LDMI Telecommunications, Inc)
Level 3 Communications LLC)
Lightyear Communications, Inc.)
Line 1 Communications, LLC)
Long Distance of Michigan, Inc.)
MCI WORLDCOM Communications, Inc.)
MCImetro Access Transmission Services, LLC)
McLeodUSA Telecommunications Services, Inc)
Midwest Communications, LLC)
Mpower Communications Corp.)
Navigator Telecommunications, LLC.)
Neutral Tandem-Michigan, LLC)
New Access Communications, LLC)
New Edge Network, Inc.)
NEXTLINK Ohio, L.L.C.)
Nexus Communications, Inc.)
Norlight Telecommunications, Inc.)
NOS Communications, Inc.)
Now Communications, Inc.)
Nuvox Communications of Ohio, Inc.)
ocom corporation)
Ohio Telecom, Inc.)
Ohiotelnet.com)
Pacific Centrex Services, Inc.)

PNG Telecommunications, Inc.)
Preferred Carrier Services, Inc.)
QuantumShift Communications, Inc.)
Qwest Communications Corporation Inc.)
Revolution Communications Company, Ltd.)
RVP Fiber Company, LLC)
Sage Telecom, Inc.)
Sprint Communications Company, L.P.)
Stonebridge Communications, Inc.)
Sure-Tel, Inc.)
Talk America Inc.)
Talk.com, Inc.)
TCG Cleveland)
TCG Ohio)
TDS Metrocom, Inc.)
Telecom Ventures, LLC)
Time Warner Communications of Ohio, L.P.)
Time Warner Telecom of Ohio, LLC)
TOTALink)
TOTALink of Ohio, LLC)
Trans National Communications International, Inc.)
United Telecom, Inc)
US West Interprise America, Inc.)
US XChange L.L.C.)
ValTech Communications L.L.C.)
VarTec Telecom, Inc.)
Weston Telecommunications, LLC)
Williams Local Network, LLC)
Winstar Communications, LLC)
XO Ohio, Inc.)
Z-Tel Communications, Inc.,)
)
Respondents.)

COMPLAINT

SBC Ohio¹ files this complaint at the direct suggestion of the Federal Communications Commission ("FCC"). In the *Triennial Review Order*, the FCC specifically stated that "it would be unreasonable and contrary to public policy to

¹ SBC Ohio is a registered trade name for The Ohio Bell Telephone Company.

preserve" vacated rules through the artifice of delaying revisions to interconnection agreements.² Likewise, in the *Interim Order*, the FCC advocated a "speedy transition" to its forthcoming new rules, and it specifically invited incumbents to initiate proceedings *today* so that the FCC's new rules "may take effect quickly" upon their issuance.³

The Parties

1. SBC Ohio is a telephone company and a public utility under R. C. § 4905.02 and 4905.03 and is an incumbent local exchange carrier under applicable law, rules, and guidelines.

2. Each of the Respondents is also a telephone company and a public utility under R. C. § 4905.02 and 4905.03, and is a "requesting telecommunications carrier" and a competing local exchange carrier ("CLEC") under applicable law, rules, and guidelines. Each Respondent is party to a currently effective interconnection agreement with SBC Ohio entered into and approved by this Commission under Section 252 of the federal Telecommunications Act of 1996 ("1996 Act" or "Act").

² Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("Triennial Review Order"), vacated in part and remanded, *USTA v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("USTA II"), petitions for cert. pending, *NARUC v. USTA*, Nos. 04-12, 04-15 & 04-18 (U.S. filed June 30, 2004) at ¶¶ 703-706.

³ See Order and Notice of Proposed Rulemaking, *In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, FCC 04-179 (FCC rel. Aug. 20, 2004) ("Interim Order") at ¶¶ 22-23.

Introduction and Summary

3. This case is brought pursuant to R. C. § 4905.26 and the "carrier-to-carrier" dispute provisions of the Commission's Local Service Guideline XVIII.C.1, adopted effective February 20, 1997 in Case No. 95-845-TP-COI.

4. SBC Ohio files this complaint to ensure that its existing section 252 interconnection agreements – which, as this Commission is aware, were intended to track federal law – conform to governing law, as directed by the FCC in its *Triennial Review Order* and its recent *Interim Order*.

5. Specifically, SBC Ohio respectfully requests that the Commission both (1) approve its proposed amendment language, which is attached hereto as Exhibit A and (2) order that such amendment be implemented by all parties as part of their interconnection agreement by November 15, 2004. This relief is necessary to make the agreements consistent with the FCC's *Triennial Review Order*, and the FCC's *Interim Order*, and in anticipation of the FCC's post-*USTA II* unbundling rules, which are expected as early as December 2004.

6. SBC Ohio's requested relief will end the unreasonable and unlawful propagation of vacated unbundling rules and contract requirements based on those rules, while at the same time ensuring that all parties, ILECs and CLECs alike, receive that to which they are entitled under binding federal law.

7. As is more completely described below, despite significant changes in federal unbundling requirements, the CLEC Parties have refused to conform their interconnection agreements to governing law. This refusal constitutes an unreasonable practice under R. C. § 4905.26. As matters stand now, existing interconnection agreements in this state continue to include network elements the FCC previously required ILECs to unbundle, but which have been since "declassified" (i.e., no longer required to be unbundled) by FCC order or judicial decision.

8. By addressing all of the out-of-compliance interconnection agreements in a single complaint proceeding, SBC Ohio hopes and intends that party and Commission resources can be conserved, rather than expended in the resolution of multiple dispute resolution proceedings involving different agreements, but identical issues of law.

9. For almost a year, SBC Ohio has attempted to engage the CLECs on an individual basis to amend their interconnection agreements pursuant to the change in law provisions in those agreements, but without success. At best, the current situation between SBC Ohio and the CLEC Parties can be characterized as "impasse."

10. As a result, SBC Ohio is compelled to seek this Commission's assistance in conforming the interconnection agreements to governing law.

Federal Unbundling Requirements Have Changed And The FCC Expects Those Changes To Be Expeditionously Implemented

11. Federal unbundling requirements promulgated by the FCC have changed, and the FCC expects those changes to be expeditionously implemented. Since the passage of the 1996 Act, local exchange carriers and state commissions alike have devoted an enormous amount of resources to implementing interconnection agreements that satisfy the FCC's unbundling requirements issued under the auspices of section 251 of the 1996 Act.

12. Under the 1996 Act, a prerequisite to CLECs obtaining access to unbundled network elements are lawful federal rules identifying which network elements ILECs are required to make available on an unbundled basis.

13. The FCC first put in place a comprehensive set of unbundling rules in August 1996.⁴ For the next few years, those rules were under attack in the federal courts, and they were ultimately vacated as overbroad by the Supreme Court in *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999). The FCC responded by issuing two separate orders: the *UNE Remand Order*⁵ to address the unbundling of most facilities, and the *Line Sharing*

⁴ *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd. 15499 (1996) ("Local Competition Order").

⁵ Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696 (1999) ("UNE Remand Order"), vacated and remanded, *United States Telecomm. Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002), cert. denied, 123 S. Ct. 1571 (2003).

*Order*⁶ to address the unbundling requirements as to elements used to provide DSL-based service.

14. In the spring of 2002, those rules met the same fate as the *Local Competition Order*: the D.C. Circuit, in *USTA I*, vacated and remanded both orders. In response to that decision, SBC Ohio timely invoked the change-of-law processes in its interconnection agreements, notifying CLECs of SBC Ohio's intent to negotiate – and, if necessary, arbitrate – new agreement language. The FCC, however, quickly signaled its intent to put in place new rules to replace the ones the D.C. Circuit vacated. As a result, SBC Ohio abated its efforts to conform its agreements to governing law, and instead awaited the FCC's new rules.

15. Those new rules were released on August 21, 2003, with the FCC's massive *Triennial Review Order*, and they took effect six weeks later, on October 2, 2003. Importantly, in the *Triennial Review Order*, the FCC directed carriers immediately to undertake the process of updating their interconnection agreements to incorporate the new rules.⁷

⁶ Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd 20912 (1999) (“*Line Sharing Order*”), vacated and remanded, *United States Telecom Ass’n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002), cert. denied, 123 S. Ct. 1571 (2003).

⁷ See *Triennial Review Order*, 18 FCC Rcd at 17403-06, ¶¶ 700 – 706.

16. In the *Triennial Review Order*,⁸ the FCC for the first time foreclosed unbundled access to, among other things, enterprise switching and certain broadband facilities. On review of that decision, the D.C. Circuit in *USTA II* upheld those determinations, while at the same time holding that the FCC had failed to justify its rules requiring unbundled access to other facilities, including mass-market switching and high-capacity loops and transport, and vacating those rules.

17. Now, in the wake of that *USTA II* decision, the FCC is poised to again issue final unbundling rules (regarding mass market switching, high-capacity loops, and dedicated transport) consistent with the D.C. Circuit Court's recent definitive ruling in *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. Cir. 2004) ("*USTA II*").⁹

18. By its *Interim Order* (and accompanying NPRM), released on August 20, 2004 and published in the Federal Register on September 13, 2004, the FCC initiated a *USTA II* remand proceeding to create new unbundling rules to govern existing and new interconnection agreements. The *Interim Order* takes three steps:

- A. First, the *Interim Order* invites comments on the appropriate content of the final unbundling rules the FCC will promulgate, consistent with the *USTA II* decision. These final rules are expected to be issued by December 2004.

⁸ Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*"), vacated in part and remanded, *USTA v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"), petitions for cert. pending, *NARUC v. USTA*, Nos. 04-12, 04-15 & 04-18 (U.S. filed June 30, 2004).

⁹ *Interim Order* ¶ 1.

- B. Second, it puts in place interim, "stand-still" requirements to govern existing interconnection agreements (those in effect as of June 15, 2004) on a temporary basis until final rules are implemented. Pursuant to these "stand-still" requirements ILECs must continue to make available the UNEs vacated by USTA II (mass market switching, high-capacity loops, and dedicated transport) under existing agreements providing for those elements.
- C. Third, and most importantly for present purposes, the *Interim Order* contemplates that ILECs will initiate proceedings before state commissions to modify interconnection agreements to prepare for the issuance of the FCC's forthcoming final rules. Specifically, "[i]n order to allow a speedy transition" once the FCC adopts final rules, the Commission "expressly preserve[d] incumbent ILECs' contractual prerogatives" to petition state commissions to modify their existing agreements.¹⁰ Those petitions may – indeed, in light of *USTA II* and the absence of any impairment findings in the *Interim Order*, they must – "presume the absence of unbundling requirements for switching, enterprise market loops, and dedicated transport," unless and until the FCC issues new rules to the contrary. In that way, the parties can be prepared to implement the FCC's new rules immediately upon their issuance, while at the same time adhering to the FCC's interim rules and/or

¹⁰ *Id.* ¶ 22.

SBC Ohio's rate stability commitment.¹¹ This proceeding comports with that aspect of the FCC's *Interim Order* and, with its expectation in the earlier *Triennial Review Order* that parties would act quickly to conform their agreements to governing law.¹²

19. Although this Commission may not supplant the FCC's role in identifying unbundled elements, it can, and should, take action to ensure that the parties' interconnection agreements conform to federal law, and to ensure that parties in this state are poised to implement the FCC's final rules, scheduled to issue as early as December 2004.

20. In its *Interim Order*, the FCC specifically prohibits the "implementation or propagation" of unbundling rules that are no longer in effect,¹³ and directs the parties (and state commissions) to avoid "wasteful" litigation¹⁴ and prepare for a "speedy transition" to the new regime. The FCC notes that if change in law proceedings are

¹¹ The FCC's interim rules have been challenged in the D.C. Circuit by the United States Telecom Association, Qwest Communications International, Inc., and the Verizon telephone companies. See Petition for a Writ of Mandamus, *United States Telecom Ass'n v. FCC*, Nos. 00-1012 *et al.* (D.C. Cir. filed Aug. 23, 2004). That challenge does not affect the FCC's plans to issue new permanent rules – indeed, it seeks to hasten those new rules – and thus only underscores the need to prepare to implement those new rules expeditiously. In the event the challenge to the FCC's interim rules is successful and the interim rules are vacated, SBC Ohio will continue to adhere to its voluntary commitment.

¹² See *Triennial Review Order* ¶¶ 700 – 706.

¹³ *Interim Order* ¶ 23.

¹⁴ *Id.* ¶ 17.

initiated quickly, then contract language that indicates that certain UNEs are no longer required may take effect quickly in the event final rules decline to require unbundling.¹⁵

21. The FCC recently confirmed that, in the wake of the *Interim Order*, ILECs can and should initiate change of law proceedings so as to ensure the prompt implementation of the forthcoming permanent rules. As the FCC explained, after the *Interim Order*, "ILECs are free to initiate 'change of law proceedings that presume the absence of unbundling requirements for switching, enterprise market loops, and dedicated transport'" and that will "go forward even before the FCC promulgates its final rules on remand," thus permitting the FCC's permanent rules to "take effect quickly" upon their issuance.¹⁶

The CLEC Parties' Interconnection Agreements Do Not Comply With Federal Law

22. The Respondent CLECs' interconnection agreements do not comply with federal law despite SBC Ohio's attempts to conform them to do so. As noted above, federal unbundling law has seen rapid change in recent years.

23. Following the October 2003 effective date of the *Triennial Review Order*, SBC Ohio again timely and properly invoked the contractual change-in-law amendment process set forth in the CLEC interconnection agreements. Specifically, following the effective date of the *Triennial Review Order*, SBC Ohio provided the Respondent CLECs

¹⁵ *Id.* ¶ 23.

¹⁶ Opposition of Respondents to Petition for Writ of Mandamus at 10, *United States Telecom Association, v. FCC*, No. 00-1012 (D.C. Cir. filed Sept. 16, 2004) (quoting *Interim Order* ¶ 23).

with written notice of the need to update their interconnection agreements to reflect the TRO's findings.

24. Later, after the D.C. Circuit's June 16, 2004 issuance of its mandate in *USTA II*, SBC Ohio notified Respondent CLECs (and other CLECs) with as-yet-unmodified interconnection agreements of the continuing need to conform their interconnection agreements to governing law, this time with the findings of *USTA II*.

25. SBC Ohio and certain CLECs were able to agree upon appropriate modifications, and SBC Ohio does not seek to include those CLECs in this proceeding. Those CLECs are the exception, however. The majority of SBC Ohio's interconnection agreements remain out of compliance with governing law.

This Commission's Assistance Is Required To Conform The Parties' Agreements To Governing Federal Law

26. This Commission's assistance is required to conform the parties' agreements to governing federal law. In response to the FCC's call to action in both the *Triennial Review Order* and its *Interim Order*, SBC Ohio initiates this case to achieve the conformance of the CLEC Parties' interconnection agreements to governing law. The FCC has indicated that the propagation of UNEs under unlawful, vacated rules is harmful for the industry,¹⁷ and SBC Ohio accordingly requests this Commission's assistance in getting its interconnection agreements conformed so that the parties may quickly

¹⁷ *Interim Order* ¶ 23.

implement permanent rules with a minimum of intervention by this Commission at that time.

27. Accordingly, with this complaint, SBC Ohio proposes amendment language that would have exactly that effect. This proposed amendment, attached as Exhibit A to this complaint, consolidates into one amendment the basic terms and conditions that SBC Ohio has previously proposed to the CLECs in multiple amendments. It combines (and greatly simplifies) the substance of the TRO Amendment by simply listing the unbundled network elements that were determined to no longer be required by the FCC in its *Triennial Review Order*. Like SBC Ohio's Post-USTA II Amendment, it also lists the unbundled network elements whose unbundling requirements were vacated by *USTA II*. It adds a section indicating how the FCC's *Interim Order* will be implemented (by "freezing" the ability of SBC Ohio to cease providing the *USTA II*-vacated UNEs for the alternative periods of time set forth in the *Interim Order*, assuming it is in effect). And, like the Lawful UNEs Amendment, it provides for an orderly notice and transition period for the *USTA II*-vacated UNEs and for any other UNEs that may be deemed to no longer be required.¹⁸

28. SBC Ohio respectfully requests that the Commission approve its proposed amendment language and, furthermore, that the Commission order it to be implemented by all Respondents by November 15, 2004, in anticipation of new FCC unbundling rules

¹⁸ SBC Ohio's proposal takes into account both the transition period established by the *Interim Order* and, in the alternative, SBC Ohio's corporate rate stability commitment through the end of 2004.

by the end of the year. This relief would put an end to the unreasonable and unlawful propagation of vacated unbundling rules, while at the same time ensuring that all parties, ILECs and CLECs alike, receive that to which they are entitled under binding federal law.¹⁹

Relief Requested

29. Specifically, SBC Ohio seeks the following:

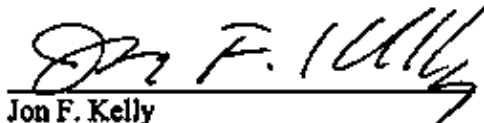
- A. An Order approving SBC Ohio's proposed amendment attached hereto as Exhibit A as sufficient to conform interconnection agreements to governing law related to SBC Ohio's section 251 unbundling obligations; and
- B. An Order directing that SBC Ohio and the Respondent CLECs incorporate this approved amendment into their interconnection agreements by November 15, 2004 (in anticipation of FCC unbundling rules issuing in December 2004).

¹⁹ In seeking amendment of its Section 251/252 interconnection agreements, SBC Ohio in no way waives its right to assert in this or any other proceeding or circumstance that it has no obligation, contractual or otherwise, to provide products or services pursuant to the 251/252 interconnection agreement on an unbundled basis where there is no lawful FCC or judicial mandate in effect that requires it to do so.

Respectfully submitted,

SBC Ohio

By:



Jon F. Kelly

Mary Ryan Fenlon

SBC

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Columbus, Ohio 43215

(614) 223-7928

Its Attorneys

EXHIBIT A

WHEREAS, the Federal Communications Commission ("FCC") released on August 21, 2003 a "Report and Order on Remand and Further Notice of Proposed Rulemaking" in CC Docket Nos. 01-338, 96-98 and 98-147, 18 FCC Rcd 16978 (as corrected by the Errata, 18 FCC Rcd 19020, and as modified by Order on Reconsideration (rel. August 9, 2004) (the "Triennial Review Order" or "TRO"), which became effective as of October 2, 2003; and

WHEREAS, by its TRO, the FCC ruled that certain network elements were not required to be provided as unbundled network elements under Section 251(c)(3) of the Telecommunications Act of 1996 ("Act"), and therefore, [SBC ILEC] is no longer legally obligated to provide those network elements on an unbundled basis to CLEC under federal law; and

WHEREAS, the U.S. Circuit Court of Appeals, District of Columbia Circuit released its decision in *United States Telecom Ass'n v. F.C.C.*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*") on March 2, 2004 and its associated mandate on June 16, 2004; and

WHEREAS, the *USTA II* decision vacated certain of the FCC rules and parts of the TRO requiring the provision of certain unbundled network elements under Section 251(c)(3) of the Act, and therefore, [SBC ILEC] is no longer legally obligated to provide those network elements on an unbundled basis to CLEC under federal law;

NOW, THEREFORE, in consideration of the foregoing, and the promises and mutual agreements set forth in the Agreement and in this Amendment, the Agreement is hereby amended to ensure that the terms and conditions of the Agreement related to specific network elements made available hereunder on an unbundled basis under Sections 252(c)(3) and (d)(2) are conformed so as to be consistent with applicable federal law:

- 1.1 Pursuant to the TRO and to the decision in *USTA II*, except as provided in Paragraph 2.1, nothing in the Agreement requires [SBC ILEC] to provide to CLEC any of the following items, either alone or in combination (whether new, existing, or pre-existing) with any other element, service or functionality:

(i) entrance facilities; (ii) dedicated transport, at any level, including but not limited to DSO, OCn, DS1, DS3, or dark fiber transport; (iii) local circuit switching [or any other form of circuit switching]; (iv) OCn loops, DS1 or DS3 loops, or dark fiber loops; (v) the feeder portion of the loop; (vi) the "high frequency portion of the loop" (including as used in line sharing); (vii) any call-related database (other than the 911 and E911 databases), that is not provisioned in connection with CLEC's use of [SBC ILEC]'s unbundled local circuit switching (as local circuit switching is no longer, or is no longer to be, provided under this Agreement on an unbundled basis, [SBC ILEC] is not obligated to provide, and CLEC shall not request such call-related databases, other than the 911 and E911 databases, under this Agreement); (viii) SS7 signaling that is not provisioned in connection with CLEC's use of [SBC ILEC]'s unbundled local circuit switching (as local circuit switching is no longer, or is no longer to be, provided under this Agreement on an unbundled basis, [SBC ILEC] is not obligated to provide, and CLEC shall not request, SS7 signaling under this Agreement); (ix) packet switching, including routers and DSLAMs; (x) the packetized bandwidth, features, functions, capabilities, electronics and other equipment used to transmit packetized information over hybrid loops (as defined in 47 C.F.R. §

51.319(a)(2)), including without limitation, xDSL-capable line cards installed in digital loop carrier ("DLC") systems or equipment used to provide passive optical networking ("PON") capabilities; (xi) fiber-to-the-home Loops (as defined in 47 C.F.R. § 51.319(a)(3)) ("FTTH Loops"), except to the extent that [SBC ILEC] has deployed such fiber in parallel to, or in replacement of, an existing copper loop facility and elects to retire the copper loop, in which case [SBC ILEC] will provide nondiscriminatory access to a transmission path capable of voice grade service over the FTTH loop on an unbundled basis to the extent required by terms and conditions in the Agreement.

1.2 For purposes of this Amendment, the following elements shall be referred to as the "USTA II Elements":

- 1.2.1 local circuit switching for "mass market" customers (as used in the TRO) (per vacatur of 47 C.F.R. § 51.319(d)(2),(5));
- 1.2.2 DS1 and DS3 dedicated transport (per vacatur of 47 C.F.R. § 51.319(e)); and
- 1.2.3 DS1 and DS3 loops (per vacatur of 47 C.F.R. § 51.319(a)(4),(5),(7)), and dark fiber loops and transport (per vacatur of 47 C.F.R. § 51.319(e) and 47 C.F.R. § 51.319(a)(6)).

2.1 USTA II Elements. [SBC ILEC] shall provide under this Agreement, on an unbundled basis, the USTA II Elements until the earlier of (a) the effective date of final unbundling rules adopted by the FCC in the proceeding opened by the *Notice of Proposed Rulemaking* appended to the *Interim Order*, or (b) the date that is six months after Federal Register publication of the Order and Notice of Proposed Rulemaking, in the *Matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, FCC 04-179 (rel. Aug. 20, 2004) ("*Interim Order*"), that date being March 13, 2005; or (c) if the *Interim Order* is withdrawn, vacated or stayed, or are otherwise determined to be invalid, the date it is withdrawn, vacated or stayed, or is otherwise determined to be invalid ("*Interim Order Exclusion*"). Pursuant to the *Interim Order*, the continuation of the rates, terms and conditions applicable to the USTA II Element may be superseded by (1) voluntarily negotiated agreements between [SBC ILEC] and CLEC, (2) an intervening FCC order affecting specific unbundling obligations (e.g., an order addressing a pending petition for reconsideration), or (3) (with respect to rates only) a state public utility commission order raising the rates for network elements.

2.1.1 To the extent the Agreement is still in effect following the occurrence of the earlier of (a), (b) or (c), above, the following shall occur:

2.1.1.1 If (a) – The *Interim Order Exclusion* shall expire, and the general rule of Paragraph 1.1 shall become fully applicable and effective as to each of the USTA II Elements (subject to the Notice and Transition set forth in Section 3.1, below); provided, however, that any USTA II Element for which the FCC has adopted a rule(s) requiring that such USTA II Element must be made available under Section 251(c)(3) shall continue to be provided by [SBC ILEC] in accordance with rates, terms and conditions of this Agreement related to those USTA II Element(s) that were in effect prior to the Effective Date of this Amendment, to the extent they are consistent with the new FCC rule(s), all subject to any subsequent amendments permitted by the *Interim Order*. In any event, the parties shall incorporate rates, terms and conditions that fully reflect the new FCC rule(s) for any such USTA II Element into the Agreement by an amendment, approved by the Commission.

2.1.1.2 If (b) – The Interim Order Exclusion shall expire, and the general rule of Paragraph 1.1 shall become fully applicable and effective as to the USTA II Elements (subject to the Notice and Transition set forth in Section 3.1, below).

2.1.1.3 If (c) – The Interim Order Exclusion shall expire, and the general rule of Paragraph 1.1 shall become fully applicable and effective as to the USTA II Elements as of January 1, 2005 (subject to the Notice and Transition set forth in Section 3.1, below).

2.1.2 Nothing in this Paragraph 2.1 shall affect the application of Paragraph 1.1 to elements that are *not* USTA II Elements.

3.1 **Notice and Transition.** In addition, if the Interim Order Exclusion ends because Section 2.1(a) occurs, and the FCC determines that one or more additional network elements are no longer required to be unbundled under Section 251(c)(3), then [SBC ILEC] is not required to provide the element(s) on an unbundled basis, either alone or in combination (whether new, existing, or pre-existing) with any other element, service or functionality, to CLEC under this Agreement, and the following notice and transition procedure shall apply:

3.1.1 [SBC ILEC] will provide written notice to CLEC of the fact that the network element(s) and/or the combination or other arrangement in which the network element(s) had been previously provided on an unbundled basis is no longer required to be provided. During a transitional period of thirty (30) days from the date of such notice, [SBC ILEC] agrees to continue providing such network element(s) under the terms of this Agreement.

3.1.1.1 Upon receipt of such written notice, CLEC will cease new orders for such network element(s) that are identified in the [SBC ILEC] notice letter. [SBC ILEC] reserves the right to monitor, review, and/or reject CLEC orders transmitted to [SBC ILEC] and, to the extent that the CLEC has submitted orders and such orders are provisioned after this 30-day transitional period, such network elements are still subject to this Paragraph 3.1, including the CLEC options set forth in subparagraph 3.1.1.2 below, and [SBC ILEC]'s right of conversion in the event the CLEC options are not accomplished by the end of the 30-day transitional period.

3.1.1.2 During such 30-day transitional period, the following options are available to CLEC with regard to the network element(s) identified in the [SBC ILEC] notice, including the combination or other arrangement in which the network element(s) were previously provided:

(i) CLEC may issue an LSR or ASR, as applicable, to seek disconnection or other discontinuance of the network element(s) and/or the combination or other arrangement in which the element(s) were previously provided; or

(ii) [SBC ILEC] and CLEC may agree upon another service arrangement (e.g. via a separate agreement at market-based rates or resale), or may agree that an analogous resale service or access product or service may be substituted, if available.

Notwithstanding anything to the contrary in the Agreement, including any amendments to the Agreement, at the end of the thirty (30) day transitional period, unless CLEC has submitted a

disconnect/discontinuance LSR or ASR, as applicable, under subparagraph 3.1.1.2(i), above, and if CLEC and [SBC ILEC] have failed to reach agreement, under subparagraph 3.1.1.2(ii), above, as to a substitute service arrangement or element, then [SBC ILEC] will convert the subject element(s), whether alone or in combination with or as part of any other arrangement to an analogous resale or access service or arrangement, if available, at rates applicable to such analogous service or arrangement.

- 4.1 Except as prohibited or otherwise affected by the *Interim Order*, nothing in this Amendment shall affect the general application and effectiveness of the Agreement's "change of law," "intervening law", "successor rates" and/or any similarly purposed provisions. The rights and obligations set forth in this Amendment apply in addition to any other rights and obligations that may be created by such intervening law, change in law or other substantively similar provision.